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October 17, 1997

*BY HAND DELIVERY*

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, DC 20554

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**Re: Implementation of the Local Competition Provision in the  
Telecommunications Act of 1996  
(CC Docket No. 96-98)  
Interconnection between Local Exchange Carriers and  
Commercial Mobile Radio Service Providers  
(CC Docket 95-185)**

Dear Mr. Caton:

Enclosed for filing in the above-referenced dockets are the original and eleven copies of the "Reply Comments of LCI International Telecom, Inc." in response to the Further Notice of Proposed Rulemaking in the referenced dockets, FCC 97-295, released August 18, 1997.

Under separate cover, we have submitted a diskette of the reply comments to Janice Myles.

Please return a date-stamped copy of the enclosed (copy provided)

Respectfully submitted,



Linda L. Oliver  
Counsel for LCI International Telecom  
Inc.

Enclosures

cc: Janice Myles  
ITS, Inc.  
Attached Service List

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Implementation of the Local Competition )  
Provisions in the Telecommunications Act )  
of 1996 )  
)  
Interconnection between Local Exchange )  
Carriers and Commercial Mobile Radio )  
Service Providers )

CC Docket No. 96-98

CC Docket No. 95-185

REPLY COMMENTS OF LCI INTERNATIONAL TELECOM CORP.

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October 17, 1997

## SUMMARY

The Commission has already established that dedicated and shared interoffice transport are required unbundled network elements under Section 251(c)(3). The plain language of the Act dictates, as the Commission has concluded, that unbundled elements may be used by any telecommunications carrier to provide any telecommunications service, including exchange access. The Commission also has held that if a carrier is providing local exchange service using unbundled local switching, that carrier can self-provide access transport and provide access transport to others using unbundled transport.

The question in the Further Notice is whether the Commission can require that a requesting carrier be providing local exchange service before it can use unbundled transport to provide or self-provide exchange access. Nothing offered by any of the commenters would justify such a limitation. Neither the Act, the Commission's prior orders, nor decisions of the Eighth Circuit on review of those orders would permit a restriction on the category of carrier that can use network elements or the services that carriers can provide over those elements.

Such restrictions also would not consistent with promoting competition in the exchange access market, a goal of both Congress and the Commission. Competitive access providers, for example, need to be able to use transport network elements in order to develop robust competitive transport offerings. The ability to obtain access from competitive sources, and to use unbundled elements to self-provide access, was an important part of the Commission's reasoning in taking a

market-based approach to reform of concededly above-cost access charges.

Restricting the use of transport network elements for exchange access would be flatly inconsistent with these goals. There are no technical reasons, moreover, to justify restricting this use of UNEs.

In sum, the Commission should conclude that requesting carriers are permitted to use transport network elements, both dedicated and shared, to provide or self-provide any telecommunications service, including exchange access.

## TABLE OF CONTENTS

	Page
I. RESTRICTING THE USE OF UNES FOR ACCESS PURPOSES TO THOSE CARRIERS HAVING THE LOCAL CUSTOMER IS CONTRARY TO THE ACT. ....	2
II. THE UNRESTRICTED AVAILABILITY OF TRANSPORT UNES IS ESSENTIAL IF THE ACCESS TRANSPORT MARKET IS TO BECOME COMPETITIVE. ....	5
III. THE FIRST RECONSIDERATION ORDER CANNOT BE APPLIED TO INTEROFFICE TRANSPORT. ....	7
IV. THE FACT THAT TRANSPORT UNES ARE FUNCTIONALLY SIMILAR TO ACCESS SERVICES DOES NOT CHANGE THEIR CHARACTER OR THEIR AVAILABILITY AS NETWORK ELEMENTS. ....	9
V. THERE ARE NO TECHNICAL REASONS TO LIMIT THE USE OF UNES FOR ACCESS. ....	11
VI. PERMITTING UNRESTRICTED USE OF UNES RAISES NO JURISDICTIONAL ISSUES. ....	13
VII. THE COMMISSION SHOULD NOT ADDRESS ALTS REQUEST FOR A RULING ON THE TIC APPLICABILITY WITHOUT SEEKING FURTHER COMMENT. ....	15

Before the  
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Washington, D.C. 20554

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	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
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Interconnection between Local Exchange	)	CC Docket No. 95-185
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Service Providers	)	

**REPLY COMMENTS OF LCI INTERNATIONAL TELECOM CORP.**

LCI International Telecom Corp., hereby files its reply comments in response to the FCC's August 18, 1997, Further Notice of Proposed Rulemaking in the referenced docket ("Further Notice"). 1/

LCI supports the views of AT&T, CompTel, MCI, WorldCom and others that unbundled transport (whether shared or dedicated) may be used by any requesting carrier to provide any telecommunications service, including exchange access. The opponents of this position -- mostly incumbent LECs -- have failed to show how the Act could be read any other way.

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98 and 95-185, FCC 97-295, released August 18, 1997. LCI did not file initial comments in response to the Further Notice.

**I. RESTRICTING THE USE OF UNES FOR ACCESS PURPOSES TO THOSE CARRIERS HAVING THE LOCAL CUSTOMER IS CONTRARY TO THE ACT.**

In the Third Reconsideration Order the FCC correctly affirmed that shared transport is a network element under the Act and that purchasers of unbundled local switching (ULS) may use shared transport for purposes of completing both local and long distance calls. Accordingly, the FCC concluded, they may use shared transport to provide exchange access to themselves and to IXC's.

In its Further Notice, the Commission asks whether carriers that *do not* purchase unbundled local switching may purchase dedicated or shared transport for the purposes of providing exchange access to themselves or to others. 2/ There is no logic under the Act or in the nature of the network that would support a decision by the Commission that *only* carriers purchasing the ULS element may use dedicated or shared transport for access purposes. The Act simply does not contemplate such limitations.

As the FCC made clear in its August 1996 Local Competition Order, there is no legal or policy justification for denying any telecommunications carrier the ability to use any unbundled network element (UNE) to provide any

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2/ Further Notice at paras. 60-61.

telecommunications service. The FCC said:

[S]ection 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers to purchase unbundled elements for the purpose of offering exchange access service, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.<sup>3</sup>

Many of the commenters argue that the Act and the FCC's earlier orders in this case require a prohibition on the use of UNEs to provide exchange access, or at least a limitation on this use to those carriers that also have captured the local end user customer. As USTA puts it, maintaining the "distinction" between UNEs and access "will help ensure that requesting carriers are in fact engaged in -- and bear the risks of -- the enterprise for which the 1996 Act unbundled network elements [are] to be used: the provision of local exchange service." <sup>4/</sup> ALTS also asserts, incorrectly, that the FCC permitted UNEs to be used for access purposes only because the access capability was technically inseverable from the local exchange capability. <sup>5/</sup>

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<sup>3</sup> Local Competition Order at para. 356.

<sup>4/</sup> USTA Comments at 6.

<sup>5/</sup> ALTS comments at 6-7, citing Local Competition Order at paras. 357, 717. In making this assertion, ALTS misrepresents the Commission's decision and reasoning. As discussed above, the Commission's holding was unlimited -- any UNE can be used by any requesting carrier to provide any service, including access. Local Competition Order at para. 356. The Commission reiterated this again in the First and Third Reconsideration Orders in this docket. In the paragraph of the Local Competition Order cited by ALTS, the FCC simply observed that when carriers purchase an unbundled loop, they obtain the ability to provide all the services that use the loop, because the loop is dedicated to a particular customer.



These assertions, in any case, simply cannot be squared with the language of Section 251(c)(3), which states that unbundled network elements may be used to provide “*any telecommunications service.*” 6/ “Telecommunications service” also is broadly defined in the Act, and as the FCC found, includes exchange access and interexchange services. 7/ Nowhere in the Act is there a prerequisite that one of those telecommunications services provided by a requesting carrier must be conventional local exchange service. In fact, the definition of “local exchange carrier” in the Act includes carriers offering “telephone exchange *or* exchange access.” 8/ Thus, even if Congress could be deemed to implicitly require a requesting carrier to be in the local exchange business to qualify to use UNEs, providers of exchange access would qualify.

In sum, then, there is no legal basis for reading the Act to condition the use of UNEs to provide exchange access on the simultaneous provision of local exchange service to the subscriber lines in question.

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Id. at para. 357. This was not the *reason* that the FCC held that purchasers of UNEs can provide or self-provide access, a point the FCC had already discussed and resolved before it reached the passage cited by ALTS. Compare paragraphs 356 and 357 of the Local Competition Order.

6/ 47 U.S.C. § 251(c)(3) (emphasis added).

7/ Local Competition Order at para. 356. “The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*” 47 U.S.C. § 153(46) (emphasis added).

8/ “The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service *or* exchange access.” 47 U.S.C. § 153(26) (emphasis added).

**II. THE UNRESTRICTED AVAILABILITY OF TRANSPORT UNES IS ESSENTIAL IF THE ACCESS TRANSPORT MARKET IS TO BECOME COMPETITIVE.**

Allowing only those carriers who have a local exchange end user customer to use UNEs -- and only in connection with that customer -- is an unjustifiable limitation on the use of UNEs, for policy as well as legal reasons. As a policy matter, this limitation would mean, first, that UNEs can never be used by a competitive provider of exchange access -- an odd result, given the fact that the predominant form of local competition up to the point of passage of the 1996 Act was provided by "competitive access providers" or "CAPs." Second, it would mean that the FCC would have to walk away from any hope of fostering competition in the market for access transport, except when provided by exclusively *facilities-based* carriers. Congress would not have included "exchange access" in the definition of "local exchange carrier" if it did not intend for competition to develop not just for local exchange service but also for exchange access.

It is not enough to say, moreover, that a carrier providing local exchange service can provide exchange access when it has captured the local customer. First, it has to capture the local customer -- no mean feat. Second, having the local customer does nothing to help the IXC reduce terminating access charges.

Third, it does nothing to promote competition in access transport. The FCC itself recognized in the Access Reform Order that competitive pressure on

access rates would come not only from self-provision of exchange access but also from the availability of competitive providers of exchange access. 9/

For many years, the FCC has endeavored to create a competitive market for the provision of interoffice access transport services. It first authorized expanded interconnection so that the market for special access services could become more competitive, then extended that policy to include switched access transport. In its decision in the Access Reform proceeding, the FCC chose a market-oriented approach to bringing access rates down to cost, and relied on the ability of IXC's to "seek out competitive providers of comparable services." 10/

If the FCC restricts the ability of the ILECs' competitors to use unbundled elements to create competitive access offerings, it will greatly reduce the competitiveness of the access transport market from competition. Competitive access providers will only be able to provide competing switched access products over their own interoffice facilities, and will not be able to combine those facilities with unbundled dedicated and shared transport to create a more robust access offering. Two competitive access providers commenting in this proceeding made exactly this point. 11/

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9/ Access Reform Order CC Docket Nos. 96-262 et al., FCC 97-158, released May 16, 1997, petition for review pending, at para. 265 ("Access Charge Reform").

10/ Access Charge Reform at para. 265.

11/ See Comments of LBC Communications, Inc., at 2 (LBC plans "early entry through pure competitive access service. . . . Although LBC intends to use its own network facilities wherever and whenever possible, it may rely on unbundled transport to provide certain links, or redundant links, in its network architecture."); Comments of KMC Telecom, Inc. at 5-6.

The fact that the carrier purchasing the ULS and loop can purchase dedicated or shared transport and use it to provide exchange access to others does not help the situation. If the FCC declines to permit *other* carriers also to purchase UNEs to provide and self-provide access, it will have the effect of conferring an effective monopoly on provision of access transport via UNEs on the customer's local exchange carrier. Yet it is the interexchange carrier, and not the local exchange carrier, that must choose the access transport provider if access transport is to be a competitive service.

In sum, restricting the availability of transport UNEs to ULS purchasers would stifle, rather than enhance, competition in access transport, contrary to Congressional and Commission intent.

### **III. THE FIRST RECONSIDERATION ORDER CANNOT BE APPLIED TO INTEROFFICE TRANSPORT.**

A number of commenters argue that the FCC's First Reconsideration Order in this docket, which dealt with unbundled loops and unbundled switching, should be extended to cover interoffice transport. <sup>12/</sup> The First Reconsideration Order held that purchasers of unbundled local switching element gain the right not just to provide local exchange service but also switch-related access. This decision was based on the definition of the unbundled switching element in the Local Competition Order. When a carrier purchases an unbundled local switching element, it orders that element "for a particular customer line," and obtains all the

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<sup>12/</sup> See, e.g., Comments of GTE at 12-13; Comments of Ameritech at 16-17.

functions and capabilities of the switch in connection with that subscriber line. 13/ By definition, then, purchase of the unbundled switching element to provide local exchange service also includes the ability to provide exchange access. The Commission found that "as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier." 14/ It would be inconsistent with this definition, the Commission found, for others to purchase unbundled switching solely for access purposes when the ILEC has the local customer.

In contrast, shared and dedicated transport are not dedicated to a single customer line, but rather constitute interoffice network facilities used for all kinds of traffic. 15/ The logic of the First Reconsideration Order thus has no applicability to the question presented in the Further Notice. In the case of interoffice transport, there is simply no basis for creating a prerequisite that the

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13/ Local Competition Order at para. 414, quoted in First Reconsideration Order at para. 13. See also 47 C.F.R. § 51.317(c)(1)(i)(C).

14/ Local Competition Order at para. 13.

15/ Ameritech is incorrect in asserting that the FCC has concluded that shared transport "cannot be provided separately from unbundled local switching." Ameritech Comments at 17, citing Third Order on Reconsideration. If the FCC had concluded this, there would have been no need for this Further Notice. None of the citations to that reconsideration order, moreover, says that shared transport cannot be "provided separately" from unbundled local switching. Rather, the Commission observed that "[r]equesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein. . . ." Third Reconsideration Order at para. 47.

requesting carrier also be the end user's local exchange carrier before being able to purchase transport network elements for access purposes.

Finally, it is essential to underscore that the First Reconsideration Order was based on the *per-line nature* of the unbundled local switching element, and *not* on any prerequisite that the requesting carrier provide local exchange service in order to qualify to use a network element for access purposes. In fact, any such prerequisite would violate the Act. Because transport is not linked to a particular customer, it cannot be treated the same as unbundled local switching was.

**IV. THE FACT THAT TRANSPORT UNES ARE FUNCTIONALLY SIMILAR TO ACCESS SERVICES DOES NOT CHANGE THEIR CHARACTER OR THEIR AVAILABILITY AS NETWORK ELEMENTS.**

Several of the ILEC parties argue that because dedicated and shared transport functionally are similar to access transport under Part 69, they cannot be available as network elements. 16/ The argument that a service cannot also be a network element was squarely rejected by the Eighth Circuit. The Court rejected such arguments in upholding the network element status of operator services, operational support systems, and vertical features as network elements. 17/ The fact that exchange access is a service does not mean that the underlying network capabilities and functionalities used to provide exchange access are not network elements under Section 251(c)(3) and 153(29).

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16/ See, e.g., Comments of GTE at 10; Comments of Bell Atlantic at 4-6.

17/ Iowa Utilities Board, 120 F.3d at 808-810.

In fact, the FCC's Access Reform Order contemplated that carriers would use UNEs to self-provide interexchange access, thereby avoiding above-cost access rates. This market pressure will not exist for transport if UNEs are only available when the IXC has the local customer. IXCs do not have a practical choice for access provider on the terminating side, except to the extent that they can purchase (of self-construct) competitive access transport facilities. 18/ On the originating side, only if an IXC can win the local customer can an IXC avoid access.

To the extent there is any further erosion in the practical availability of network elements in combination, moreover, the ability of IXCs to deal with above-cost access rates by winning the local customer will be eroded as well. The ILECs are fighting hard to make this option unavailable to competitors. They cannot have it both ways. The FCC only allowed above-cost access rates to stand because it expected to see competitive pressure (through self-provision of exchange access and through the development of competitive providers of exchange access). 19/ Without UNEs available for access purposes, this competitive pressure will be seriously reduced.

It is irrelevant to the FCC's question, moreover, whether dedicated or shared transport is at issue. If the FCC were to conclude that shared transport

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18/ The FCC recognized this problem in the Access Reform NPRM, FCC 96-488, released December 24, 1996, at para. 279. Although it declined to regulate the access rates of CLECs, it held forth that possibility if CLECs should raise their terminating rates to unreasonable levels. Access Reform Order at para. 364.

19/ Access Reform Order at para. 265.

cannot be used to provide or self-provide access services, then it must also conclude that dedicated transport network element cannot be used for access purposes either. The Act clearly requires the Commission to accord the same treatment to dedicated and to shared unbundled transport. Denying requesting carriers the ability to use dedicated, but not shared, transport for access would create enormous unlawful discrimination among carriers based solely on size. Thus, if the Commission concludes that requesting carriers may not employ shared transport for access purposes, it must reach the same conclusion with respect to dedicated transport as well.

**V. THERE ARE NO TECHNICAL REASONS TO LIMIT THE USE OF UNES FOR ACCESS.**

Not only are there no legal or policy reasons for limiting the use of UNES to ULS purchasers, there also are no technical reasons for such a limitation. ALTS contends, for example, that it is not possible to purchase shared transport without also purchasing unbundled local switching. 20/ This is simply incorrect. The switch routing instructions are a function or capability of the switch, not of the interoffice network. Regardless of whether the ILEC or a ULS purchaser has the local customer, the switch routing instructions will send the traffic out onto dedicated or shared facilities, according to the way the transport is purchased. The FCC recognized in the Third Report and Order in this docket that the ILEC cannot

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20/ ALTS Comments at 3. See also Comments of Ameritech at 17.



deny ULS purchasers access to those routing instructions. 21/ But it does not follow that a requesting carrier necessarily must purchase unbundled local switching in order to purchase shared transport, just as it is not necessary to purchase unbundled local switching to obtain dedicated transport. It therefore is improper to allow only requesting carriers that have purchased the ULS and loop to purchase dedicated or shared transport for the purpose of originating and terminating toll calls.

SWBT raises certain technical issues having to do with its ability to determine whether traffic has originated with an SWBT local customer or a ULS purchaser. 22/ These arguments are irrelevant to the question whether the Act allows an ILEC to limit the requesting carrier's ability to use an unbundled element to provide "any telecommunications service." SWBT's technical measurement problems, moreover, would appear to apply equally to the loop and switch. Such measurement issues can be addressed by both interim "rough justice" and permanent technical solutions. Those technical measurement issues are no reason to limit the type of use that a requesting carrier may employ for UNEs.

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21/ Third Order on Reconsideration at para. 23 ("[w]e find nothing in the *Local Competition Order* that supports the contention that requesting carriers that obtain access to unbundled local switching, pursuant to Section 251(c)(3), do not obtain access to the routing table in the unbundled local switch.") See also para. 45.

22/ SWBT Comments at 3-6.

## **VI. PERMITTING UNRESTRICTED USE OF UNES RAISES NO JURISDICTIONAL ISSUES.**

A number of commenters argue that permitting carriers to use transport network elements to provide or self-provide exchange access would violate the jurisdictional boundaries of the Act. 23/ They argue, for example, that the FCC would lose its jurisdiction over interexchange access.

The FCC and the states continue to retain jurisdiction over interstate and intrastate exchange access rates even if transport UNEs are available on an unrestricted basis. The Eighth Circuit concluded that under the Act, the FCC has the authority to define network elements, and state commissions have the authority to set the prices for network elements. 24/ But the Act does not change the division of responsibility with respect to rates for access services, just as it does not affect the division of responsibility with respect to other services that can be provided over network elements. Network elements, by definition, can be used to provide either intrastate or interstate services -- and those services are regulated by the respective commissions.

The parties opposing unrestricted use of UNEs appear to have as their real objective the sheltering of access revenues. If UNEs are made available for exchange access purposes, competitive pressure will be created on access rates, and

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23/ See, e.g., SWBT Comments at 7; BellSouth Comments at 10; NECA Comments at 3.

24/ Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997). We note that LCI does not necessarily agree with every aspect of the Eighth Circuit's decision.

the ILECs could lose access revenues. But the Act does not permit the FCC to deny access to cost-based UNEs simply to avoid a revenue impact on ILECs. Lower rates are the whole point of competition. And no one can deny that access rates are well above cost.

Both Congress and the FCC contemplated that there would be competition for exchange access as well as local exchange service as a result of the Act, and that such competition would proceed over unbundled network elements. As noted above, the FCC relied on the development of such competition in deciding to forego prescriptive approaches to reducing above-cost access charges. 25/ Section 254(g) of the Act does not call into question these FCC pronouncements, nor does it invalidate the other provisions of the Act that clearly contemplate competition in the exchange access market and unrestricted use of unbundled elements. 26/

The opponents also cite a footnote in the Eighth Circuit's July 18, 1997, decision that discusses the difference between interexchange access on the one hand and interconnection and unbundled network elements on the other. 27/

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25/ See Access Reform Order at paras. 199, 263, 265, 269.

26/ Some parties cite the Eighth Circuit's decision in the CompTel case as support for their arguments. In affirming the FCC's short-term decision to impose access charges on purchasers of unbundled local switching, the Court did not rely on Section 254(g) to negate the other provisions of the Act, such as Section 251(c)(3) and 252(d)(1). Rather, the Court held that the FCC was authorized to deviate from the cost-based pricing rules for a very short period due to the 9-month gap between the effectiveness of the local competition rules and the universal service rules. See CompTel v. FCC, 117 F.3d at 1073-75 (8th Cir. 1997)..

27/ Iowa Utilities Board v. FCC, 120 F.3d 753, 799 n.20 (8th Cir. 1997).

The Court, first of all, did not have the question before it that is presented in the Further Notice. The Court in that part of its opinion held that the FCC's jurisdiction over interstate exchange access did not give the FCC authority to price unbundled network elements. The Court in that connection contrasted exchange access with interconnection/UNEs by pointing out that the latter gives the purchaser the capability of providing local exchange service, while exchange access is a service provided by LECs only to IXC's.

The question presented in the Further Notice is entirely different: Does the Act permit an ILEC to limit the telecommunications services offered by a telecommunications carrier over network elements? The Eighth Circuit simply did not address this question. What the Court did make clear, however, is that the FCC has the authority to define network elements, pursuant to Section 252(d)(1). In exercise of that authority, the FCC has correctly concluded that both dedicated and shared transport are network elements within the meaning of Sections 251(c)(3) and 153(29). If the statute does not contemplate any restrictions on the use of these elements, then the FCC is not authorized to create any.

**VII. THE COMMISSION SHOULD NOT ADDRESS ALTS REQUEST FOR A RULING ON THE TIC APPLICABILITY WITHOUT SEEKING FURTHER COMMENT.**

The Commission should not address ALTS' request for a ruling that the residual transport interconnection charge (TIC) should be assessed when competitors use UNEs for access purposes. 28/ This question was not presented by

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28/ ALTS Comments at 4-6.

the FCC in its Further Notice and is outside the scope of this proceeding. The FCC should take further comment on this question before deciding it. ALTS improperly suggests that the FCC "clarify" this point before reaching the question presented in the Further Notice. LCI respectfully submits that the question in the Further Notice can be answered without regard to the applicability of the TIC. If the FCC believes it needs to address this issue, it should take further comment on it before reaching it.

**Conclusion**

For the reasons given, the Commission should affirm that dedicated and shared transport network elements may be used by any requesting carrier for any purpose, including the provision or self-provision of exchange access, whether or not the carrier is also providing local exchange service.

Respectfully submitted,

LCI INTERNATIONAL TELECOM  
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October 17, 1997

## CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that on this 17th day of October, 1997, copies of the foregoing "Reply Comments of LCI International Telecom, Inc." were served by hand delivery to the following:

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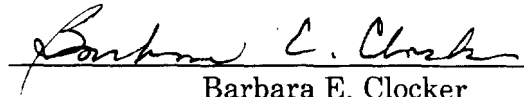
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